Office-Supreme Court, U.S.
FILED
MAY 8 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1465

# In the Supreme Court of the United States

OCTOBER TERM, 1980

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CROCKER NATIONAL BANK, PETITIONER

*v.*

STATE BOARD OF EQUALIZATION OF CALIFORNIA, ETC., ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES

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The question presented by the petition is whether Section 5219 of the Revised Statutes (12 U.S.C. 548), as amended by Pub. L. No. 91-156, 83 Stat. 434, barred the imposition of the California sales tax on sales of tangible personal property to national banks during the period December 24, 1969, through December 31, 1972. The United States joined with petitioner in bringing this action in the United States District Court for the Northern District of California for the purpose of challenging the imposition of the California sales tax on sales to national banks for that time period on the ground that the California tax was not imposed in compliance with the requirements of Pub. L. No. 91-156.

Prior to its amendment by that Act, Section 5219 prohibited the states from imposing on national banks any taxes other than the four types of specifically permitted taxes. See *First Agricultural National Bank* v. *State Tax Commission*, 392 U.S. 339 (1968). In that case, this Court held that

Section 5219 precluded Massachusetts from imposing its sales tax on transactions involving national banks as vendees.

Thereafter, Congress concluded that there was "no longer any justification for * * * continuing to grant national banks immunities from State taxation which are not afforded State banks." S. Rep. No. 91-530, 91st Cong., 1st Sess. 2 (1969). Accordingly, Section 5219 was amended by Pub. L. No. 91-156 to allow the states to tax national banks on the same basis as banks organized and chartered under state law. To allow time for the states to conform their own taxing schemes to that change, however, the "permanent" amendment to Section 5219 was not to become effective until January 1, 1972, and the effective date was subsequently delayed until January 1, 1973 (Pub. L. No. 92-213, Section 4(a), 85 Stat. 775). In the interim, the states were permitted, under a "temporary" amendment (Section 1 of Pub. L. No. 91-156, 83 Stat. 434), to impose certain additional non-discriminatory taxes on national banks. Pursuant to a "saving provision" (Section 3 of Pub. L. No. 91-156, 83 Stat. 435), however, taxes could generally be imposed on national banks during the period the "temporary" amendment remained in effect only if they had been imposed on them prior to the enactment of Pub. L. No. 91-156 or if they were thereafter authorized "by affirmative action of the State legislature." See *Chase Manhattan Bank* v. *Finance Admin.*, 440 U.S. 447 (1979). The stated purpose of that "saving provision" was to avoid the possibility that national banks would be inadvertently subjected to duplicative taxation during this period under both the general taxing provisions of a particular state and also the special taxing provisions that the state might previously have adopted in conformity with Section 5219. See S. Rep. No. 91-530, *supra*, at 6; H.R. Conf. Rep. No. 91-728, 91st Cong., 1st Sess. 4-5 (1969). Certain types of taxes, including

sales and complementary use taxes, were excepted from the requirements of that "saving provision," but only where such taxes were "imposed by a State which does not impose a tax, or an increased rate of tax, in lieu thereof." Pub. L. No. 91-156, Section 3(b), 83 Stat. 435.

Following the adoption of those amendments, this Court held, in *Diamond National Corp.* v. *State Board of Equalization*, 425 U.S. 268 (1976), that the legal incidence of the California sales tax, like that of the Massachusetts sales taxes involved in *First Agricultural National Bank*, was on the vendee and that consequently the tax could not be imposed on transactions involving national banks as vendees under Section 5219 as it read prior to the 1969 amendments. *Diamond National*, however, left open the question whether that tax was properly imposed during the period the "temporary" amendment to Section 5219 was in effect.[1]

In seeking a declaratory judgment that the California sales tax could not be imposed on transactions involving national banks as transferees during that period, the United States and petitioner argued below that the California sales tax was not permitted under Section 3(a) of the "saving provision" because (1) it had not been properly imposed on transactions involving national banks as vendees prior to the enactment of Pub. L. No. 91-156; and (2) its application to such transactions had not been authorized by "affirmative action" of the state legislature following that enactment. The United States and petitioner further argued that

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[1]Prior to this Court's decision in *Diamond National*, the State of California had long taken the position that the legal incidence of the sales tax was on the vendor and that the tax could therefore be imposed on transactions involving national banks as vendees consistently with Section 5219 and on transactions involving both state and national banks as vendees consistently with the California bank franchise tax statutes. See, *e.g.*, *Western Lithograph Co.* v. *State Board of Equalization*, 11 Cal. 2d 156, 78 P.2d 731 (1938).

the California tax did not qualify for the exception permitted by Section 3(b) of Pub. L. No. 91-156, 83 Stat. 435, on the ground that California did, in fact, impose another tax "in lieu thereof," *viz.*, the California bank franchise tax, which had long been imposed (consistently with Section 5219) on both state and national banks and which, by its terms, was imposed "in lieu of all other [state and local] taxes" (Cal. Rev. & Tax. Code § 23187 (West 1979).

The district court, however, concluded that the California franchise tax was not, for the purpose of the "saving clause" of Pub. L. No. 91-156, imposed in lieu of the sales tax at issue here. The court of appeals affirmed. It concluded that the "most natural reading of the language of § 3(b) is the one given to it by the district court—'in lieu thereof' means 'actually in lieu of those specific taxes listed in § 3(b)(1)-(3)' " (Pet. App. A-11). Turning to the California franchise tax, the court of appeals found "that during the bridge period sales tax on sales to banks was imposed *in addition* to the built-up rate of the franchise tax. Thus, the franchise tax could not have been intended by the California legislature to be in lieu of the sales tax" (emphasis in original) (Pet. App. A-15). Concluding that the state intended to collect both the franchise tax and the sales tax, the court reasoned that "automatic imposition of the sales tax under § 3(b) cannot possibly result in unintended double taxation of national banks—the evil which Congress designed § 3 to avoid" (Pet. App. A-17).

1. It is undisputed that the State of California took no affirmative legislative action of the type contemplated by Section 3(a)(2) of Pub. L. No. 91-156, 83 Stat. 435, with respect to the imposition of the California sales tax during the transition period in question in this case. It is also undisputed, in light of this Court's decision in *Diamond National Corp.* v. *State Board of Equalization*, *supra*, that

the sales tax was not properly imposed on national banks prior to the date of enactment of Pub. L. No. 91-156. Thus, it could not thereafter be imposed on national banks without affirmative legislative action prior to the effective date of the permanent amendment to Section 5219 of the Revised Statutes, unless the tax fell within the exception to that requirement provided by Section 3(b) of Pub. L. No. 91-156, 83 Stat. 435. That Act was designed to preserve the status quo until the permanent amendment to Section 5219 became effective, except as to those states which consciously and deliberately chose to impose additional taxes on national banks pursuant to the expanded authority conditionally granted by the temporary amendment to that statute. Consonant with that purpose, the exception provided under Section 3(b) of Pub. L. No. 91-156, 83 Stat. 435, should be narrowly construed so as to exempt the states from the affirmative legislative action requirement only where it is clear that the state had not imposed, or increased the rate of, any other state tax "in lieu" of the taxes enumerated therein.

Both the Constitution of the State of California, Art. XIII, § 16, and the California bank franchise tax statute itself, Cal. Rev. & Tax. Code, § 23182 (West 1979), expressly provide that the franchise tax in question is "in lieu of *all* other taxes and licenses, State, county and municipal, * * * except taxes upon their [*i.e.*, the banks'] real property" (emphasis added). At the time Pub. L. No. 91-156 was enacted, the State was still taking the position that its sales tax on sales to national banks was not imposed on the banks at all on the theory that the legal incidence of the tax was solely on the vendor. See *Western Lithograph Co.* v. *State Board of Equalization, supra.* Had the State ultimately prevailed on that theory, the provisions of Pub. L. No. 91-156 would have had no bearing on its entitlement to continue imposing the sales tax on such sales. By the same token, however, it was reasonable for the national banks to

assume that if they were to prevail, as they ultimately did, on the theory that the incidence of that tax was actually on the vendee, they would then continue to be immune from that tax during the transition period provided for under Pub. L. No. 91-156 unless and until the State took the requisite affirmative legislative action described in Section 3(a)(2). As this Court held in *Diamond National,* the incidence of the sales tax for purposes of Section 5219 of the Revised Statutes is on the vendee, and there is plainly no reason for concluding that it is any less a tax imposed on national banks for the purposes of the provisions of Pub. L. No. 91-156, than it is for the purpose of Section 5219 of the Revised Statutes itself.

It is true that the California courts have continued to adhere to the view that, for purely state law purposes, the incidence of its sales tax is deemed to be on the vendor, despite this Court's contrary conclusion in *Diamond National.* See *Western States Bankcard Ass'n* v. *City and County of San Francisco,* 19 Cal. 3d 208, 217, 561 P. 2d 273, 278, 137 Cal. Rptr. 183, 188 (1977); *Xerox Corp.* v. *County of Orange,* 66 Cal. App. 3d 746, 757, 136 Cal. Rptr. 583, 589 (1977). But it is equally clear that the state constitution and statutory provisions governing the bank franchise tax were adopted specifically with reference to Section 5219 of the Revised Statutes, and that the California bank franchise tax is itself a "federally designated in lieu tax." *Western States Bankcard Ass'n* v. *City and County of San Francisco, supra,* 19 Cal. 3d at 216, 561 P. 2d at 277, 137 Cal. Rptr. at 187.

Whatever view the California courts may take with respect to the application of those provisions for state law purposes, the California bank franchise tax must be considered, for the purposes of both Section 5219 of the Revised Statutes and the "saving provision" of Section 3 of Pub. L. No. 91-156, 83 Stat. 435, as a tax imposed "in lieu" of all

other state and local taxes within the purview of Section 5219, including those enumerated in Section 3(b) of Pub. L. No. 91-156, 83 Stat. 435.[2] The conclusion that the bank franchise tax is an "in lieu" tax for purposes of Section 3(b) does not require an additional finding that the franchise tax contained specifically designated increments equivalent to what the State could have collected by imposing a vendee sales tax on sales to national banks. It is sufficient that the State imposed the bank franchise tax because of the prohibitions in Section 5219 of the Revised Statutes—a point that is undisputed.

Moreover, the legislative history of Pub. L. No. 91-156 fully supports petitioner's reading of the "saving provision." The provisions of Section 3(b) here in issue were not contained in either the version originally passed by the House or that reported by the Senate Committee on Banking and Currency. During floor debate in the Senate, however, concern was expressed that more immediate relief should be granted to those states that did not already impose "in lieu" taxes on national banks. See the remarks of Senators Bennett and Holland (115 Cong. Rec. 35 400 (1969)). Notably, the only specific example of a state which might appropriately be given immediate taxing authority without regard to the affirmative legislative action requirement was the State of Florida, which had imposed no "in lieu" tax at all on national banks (*ibid.*). In that case, there would, of course, be no reason to require the State to review its taxing scheme before imposing new taxes on national banks.

Thus, Congress did not intend that the exceptions thereafter provided for in Section 3(b) would broadly apply in

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[2]Section 23182 of the Cal. Rev. & Tax. Code (West Cum. Supp. 1981) was amended, effective September 29, 1979, to provide that the franchise tax is in lieu of all other taxes "except taxes upon their real property, local utility user taxes, sales and use taxes, state energy resources surcharge, state emergency telephone users surcharge * * *.

cases where the State had, in fact, imposed a tax in lieu of those prohibited by Section 5219. Indeed, the correctness of this proposition is further shown by the fact that the language of those provisions appears to have been derived, almost verbatim, from a proposal first submitted by the American Bankers Association, which would have permitted certain additional taxes except by "a State which imposes any tax or imposes an increased rate of tax, in lieu of such other tax." *Hearing on Taxes on National Banks Before the Comm. on Banking and Currency,* 91st Cong., 1st Sess. (1969). Significantly, the California bank franchise tax was specifically identified at that time as the kind of tax that would preclude the imposition of any new tax under that proposal (*id.* at 59-60), and this proposal was vigorously opposed on the ground that it would, in fact, prohibit the imposition of any new tax "if there is an in lieu tax today in the home State." *id.* at 51.

Reading the statutory language in question together with this legislative history, it is plain that Congress did not intend that the courts should embark on a detailed examination of a state's taxing scheme in order to determine the state legislature's true intentions in adopting an "in lieu" tax under Section 5219, or whether a tax actually contained an incremental element designed to make up for the supposed noncollection of the particular taxes enumerated in Section 3(b) of Pub. L. No. 91-156, 83 Stat. 435. Instead, Congress intended that such an inquiry should be made, in the first instance, by the state legislature itself unless, as was the case in Florida, the State simply had not provided for any "in lieu" tax under Section 5219. Though it had such an "in lieu" tax, the State of California chose to rely on its erroneous legal position that its sales tax on transactions involving national banks simply was not within the purview of Section 5219 and the amendments made by Pub. L. No. 91-156.

Once that position was held to be unfounded, the California bank franchise tax became perforce an "in lieu" tax with respect to the State sales tax to the same extent that it was an "in lieu" tax with respect to all other taxes prohibited by Section 5219. We therefore agree with the petitioner that the district court and court of appeals erred in relieving the State of the consequences of its decision not to comply with the requirements of Section 3(a).

2. While the "affirmative action" requirement of Section 3(a) of Pub. L. No. 91-156, 83 Stat. 435, was the principal issue before this Court in *Chase Manhattan Bank* v. *Finance Admin., supra,* it appears that the proper construction and application of the "in lieu" of provisions of Section 3(b) is a question of first impression. Moreover, because the "permanent" amendment to Section 5219 has now been in effect for more than eight years, it would seem unlikely that any further litigation will arise under Section 3(b). While the issue is not of continuing importance, the decision nevertheless affects all national banks doing business within the State of California during the period in issue (December 24, 1969 - December 31, 1972), and, according to petitioner (Pet. 9), involves an aggregate of taxes and interest of $14 million.[3] Because the United States has no direct financial interest in the outcome of the case, we did not seek review by

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[3]This figure comports with the advice provided us by the Comptroller of the Currency that more than $10 million is at stake on this question. Thus, the fiscal impact of the decision below is comparable to the $9 million involved in *Chase Manhattan Bank* v. *Finance Admin., supra,* where the Court granted certiorari and summarily reversed in a case involving the applicability of a New York City commercial rent tax on national banks applicable only for periods prior to January 1, 1973.

this Court. However, for the reasons stated above, we believe that the decision below is incorrect and agree with petitioner that the judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

MAY 1981

DOJ-1981-05